

From: Warner, Jennifer (DHHS)
Sent: Mon, 8 May 2023 15:32:35 +0000
To: Starling, Demetrius (DHHS); Roubal, Lewis (DHHS)
Subject: Request for Counsel
Attachments: Memo for legal counsel compensation.dot, Memo, Crim defense for state employees (rev'd 6.22.21).pdf

Good morning,

MCL 15.243(1)(g)

Thanks,
Jennifer



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

MEMORANDUM

TO: Department Directors
FROM: Mark Totten, Chief Legal Counsel, Executive Office of the Governor
DATE: January 13, 2021 (revised July 22, 2021)
RE: Criminal defense services for state employees

State law permits the executive branch to cover the costs of legal services for current or former state employees in connection with criminal litigation, an investigation, or a proceeding under limited circumstances identified in [MCL 691.1408](#). This memo outlines a uniform policy for how the Executive Office of the Governor (EOG) and Department Directors (collectively, "governmental agencies") will exercise this authority for criminal defense services for state employees.

This policy has two overriding goals. First, it aims to achieve a consistent policy across the executive branch of state government. The tools to achieve this goal include: (1) the use of a single contract template, prepared by the state, between a governmental agency, the attorney, and the client, called the Criminal Defense Legal Services Contract – rather than using whatever contract and terms the attorney provides the state; and (2) the use of a single contract administrator ("Contract Administrator") with expertise in criminal defense who will review all proposed contracts and amendments, invoices, and proposed fees and expenses and make recommendations to the governmental agency. Second, this policy aims to impose cost controls and ensure accountability. The tools to achieve this goal include: (1) the use of a single Contract Administrator, as explained above; (2) an hourly rate that represents a discount off the attorney's standard rates; and (3) a budget ceiling, which can be raised only after careful review by the Contract Administrator, who will then make a recommendation to the governmental agency.

The remainder of this memo will further explain this policy by answering potential questions.

1. Who may receive payment for legal services?

A governmental agency may cover the costs of certain legal services for a current or former State of Michigan ("SOM") executive branch employee ("an officer or employee of a governmental agency") who is currently charged with a crime where the charge or conviction arises out of the SOM employment and, in the opinion of the governmental

agency, “the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct.” [MCL 691.1408\(2\)](#). The governmental agency must make this threshold determination in deciding to cover criminal defense expenses.

In addition, a governmental agency may cover the costs of certain legal services for a current or former officer or employee of a governmental agency in connection with a criminal investigation that involves the individual as a result of his or her conduct in the course of employment. [MCL 691.1408\(3\)](#).

A governmental agency has discretion to cover the costs of legal services regardless of the jurisdiction that has charged the individual with a crime or is conducting an investigation.

Determination of whether an individual is eligible to receive coverage for legal services under [MCL 691.1408\(2\) or \(3\)](#), is made by the governmental agency that employs or employed the individual. If a current head of a department is requesting legal services, the EOG will make the decision. Even if an individual is deemed eligible to receive legal services under [MCL 691.1408\(2\) or \(3\)](#), the governmental agency retains discretion to cover the costs for legal services.

Importantly, no attorney may receive payment for legal services from a governmental agency unless the parties enter a contract using the Criminal Defense Legal Services Contract template.

2. What legal services are covered under this policy?

[MCL 691.1408\(2\)](#) permits a governmental agency to cover certain expenses for criminal defense if a criminal action is commenced in state or federal court, which may include preparation for trial, investigation, discovery, plea negotiations, pretrial motions, interlocutory appeals, etc., as well as representation at trial or guilty or no-contest plea proceedings, representation at sentencing, motions for new trial or to vacate an invalid sentence, and direct appeals of right.

[MCL 691.1408\(3\)](#), added by [SB 1244 of 2020](#), expands the possible scope of representation. This provision permits a governmental agency to cover certain expenses in connection with a criminal investigation that involves an individual as a result of his or her conduct in the course of employment. This section does not require that the individual be a target of the investigation.

Regardless of whether [MCL 691.1408\(2\) or \(3\)](#) permits, the governmental agency will not cover expenses related to state habeas review; petitions for mandamus and superintending control; federal habeas petitions; clemency requests, etc. In addition, other than interlocutory appeals during the trial phase covered under section 8(2), appeals by leave (including appeals following a guilty or no-contest plea and appeals to the Michigan Supreme Court and U.S. Supreme Court) and motions for relief from judgment under subchapter 6.500 of the Michigan Court Rules are not covered.

All decisions to cover fees and expenses remain in the discretion of the governmental agency, subject to any contract entered by the governmental agency.

3. What process will govern the execution and amendment of a contract and payment of fees and expenses under this policy?

A governmental agency will work with a single Contract Administrator to ensure accountability and consistent application of contract terms across governmental agencies. This person will have expertise in criminal defense and will assist governmental agencies in making decisions regarding the contract, including entering the contract, paying invoices, approving budgets, and otherwise monitoring contract compliance. The current Contract Administrator is Brad Hall (hallb16@michigan.gov; 248-467-2356). The Contract Administrator will serve as the primary point of contact for the parties to the contract, including the governmental agency. All communications should flow through the Contract Administrator.

A governmental agency will use the standard Criminal Defense Legal Services Contract, which the Department of Attorney General has reviewed. This requirement ensures consistent terms across contracts and governmental agencies. The Criminal Defense Legal Services Contract covers hourly rates, reimbursable fees and expenses, contract ceilings and use of budgets, the role of the Contract Administrator, and the hiring of additional law firms, among other standard terms. It also includes a process for increasing a contract ceiling, due to the difficulty in estimating actual fees and costs and the demand for services at the outset. Only certain highlighted sections in the template will be adapted to the particular parties as indicated; all other terms are fixed and non-negotiable.

When a current or former employee requests the state cover the costs of criminal defense, the governmental agency must make a threshold determination of whether the relevant law permits the state to cover these costs. *See* Question 1. If the governmental agency determines the law permits coverage, and the governmental agency exercises its discretion to cover these costs, the governmental agency must connect the officer or employee, or that person's attorney, with the Contract Administrator.

The Contract Administrator will apply a uniform process to receive and review all contract-related requests, prepare associated documents, and make a recommendation to the governmental agency. The governmental agency is responsible for reviewing the Contract Administrator's recommendation and making a decision on the contract-related request.

For example, a lawyer and their client who wants to enter into a contract will have all discussions with the Contract Administrator and provide him or her a copy of any required documents, such as a proposed budget. The Contract Administrator will then review the documents and prepare the contract and any addenda. Next, the Contract Administrator will submit the proposed contract, any addenda, and a recommendation to the governmental agency for decision and execution. The governmental agency will then make a decision. The payment of invoices and any subsequent approvals or amendments to the contract will proceed in the same manner, with the Contract Administrator serving as

the primary point of contact and making a recommendation to the governmental agency for decision.

A governmental agency will form, amend, and implement (e.g., pay for services; pre-approve expenses, etc.) a contract only after receiving a recommendation from the Contract Administrator. These recommendations are for internal use only; a governmental agency should not share the recommendation with any outside parties unless required by law. Although the Contract Administrator's role is advisory, it is critical to achieving the goals of consistent, responsible use of state funds across the executive branch. To achieve these goals, if a governmental agency chooses not to accept a recommendation of the Contract Administrator in any particular instance, the governmental agency must first consult with the deputy legal counsel in the EOG who oversees this policy. Deputy Legal Counsel Maria Martinez (MartinezM13@michigan.gov) will serve in this role through August 2021, and Deputy Legal Counsel Jessica Weare (WeareJ@michigan.gov) will serve in this role thereafter.